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Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr., Deceased,

Petitioner,

—v.—

MARY LU REDMOND, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ILLINOIS, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU has participated in numerous cases before this Court involving both privacy rights and due process, two concerns that are also implicated in this case. The ACLU of Illinois is one of its statewide affiliates.

The Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in this Court in more than a dozen additional cases.

The issue in this case is whether the federal courts should recognize a psychotherapist-patient privilege. The issue is a profoundly important one and, although framed in the context of an evidentiary dispute, implicates core constitutional values. On the one hand, any evidentiary privilege raises due process concerns by depriving the courts of the ability to consider otherwise competent evidence that in a particular case might assist the courts in arriving at a just result. On the other hand, the psychotherapist-patient relationship is one that society has long recognized as confidential precisely because it deals with intimate, personal matters that most people regard as intensely private. For that reason, moreover, there is a widespread concern that individuals in need of treatment might be deterred from seeking it if

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

they believed that their therapeutic communications were subject to compelled disclosure.

Striking the correct balance between these competing interests is a difficult and sensitive task. *Amici* respectfully submit this brief in the hope of assisting the Court as it considers the questions of whether a psychotherapist-patient privilege exists under Rule 501 of the Federal Rules of Evidence and, assuming it does, whether it should be extended to mental health care providers other than psychiatrists and psychologists.

STATEMENT OF THE CASE

On June 27, 1991, Mary Lu Redmond, a police officer with the Village of Hoffman Estates, Illinois, responded to a report of a fight in progress at an apartment complex. When she arrived at the scene, alone, two women approached her car and advised her that there had been a stabbing inside the building. Officer Redmond testified at trial that minutes later she fired her gun and killed Ricky Allen, Sr. as he chased another man from the building and was gaining on him, was poised to stab the man with a butcher knife, and failed to heed her warnings to drop the knife.

Several of Allen's relatives witnessed the shooting and testified that Allen was not armed, that Officer Redmond had emerged from her car with her gun drawn, panicked when she saw Allen walk out of the apartment building, and shot him without warning. Officer Joe Graham, who arrived at the scene shortly after the shooting, observed a large crowd of between thirty and forty people standing on the grass and a number of people coming from the buildings. Graham testified that Officer Redmond had her gun drawn and aimed at the crowd, appeared "somewhat bewildered" and was "visibly shaken or upset or disoriented."

Allen's surviving family members (hereinafter plaintiffs) filed suit against Officer Redmond and her employer, the Village of Hoffman Estates, alleging that Officer Redmond had used deadly force in violation of Allen's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and had caused Allen's death in violation of the Illinois Wrongful Death Statute.

During the course of pre-trial discovery, plaintiffs sought access to statements Officer Redmond made following the shooting to Karen Beyer, a licensed clinical social worker[2] also employed by Hoffman Estates. Officer Redmond began meeting with Beyer a few days after the shooting and continued counseling for about six months, two or three times a week. At her deposition, Redmond refused to answer questions regarding her statements to Beyer, on the basis that the communications were privileged. Plaintiffs then subpoenaed Beyer to testify at a deposition and to produce all relevant documents and records pertaining to Officer Redmond.

Respondents moved to quash, arguing that the communications and documents were a part of the counseling rela-

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[2] A licensed clinical social worker, under Illinois law, is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work, and (2) has at least three years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders." *Jaffee v. Redmond*, 51 F.3d 1346, 1350 n.3 (7th Cir. 1995)(quoting 405 I.L.C.S. 5/1-122.1 (Ill. 1994)). Prior to becoming a licensed clinical social worker, an individual must pass an examination and have completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. *Jaffee*, 51 F.3d at 1350. Karen Beyer received her master's degree in social work from Loyola University in 1969. She was certified by the state of Illinois as an employee assistance counselor, and at the time of trial, had approximately 12,000 hours of relevant experience. *Id.*

tionship and thus privileged. The trial judge denied the motion on the ground that the psychotherapist-patient privilege did not extend to licensed clinical social workers and, accordingly, ordered Beyer to testify as to "the disclosures made to her by Ms. Redmond of the incidents of the day that relate to" the shooting. *Jaffee v. Redmond*, 51 F.3d 1346, 1351 (7th Cir. 1995). In response to this order, Beyer appeared at a second deposition and answered questions regarding her credentials and facts Officer Redmond had shared with her about events leading up to the shooting. However, Beyer refused to produce any notes or records of her sessions with Officer Redmond.[3]

Plaintiffs then filed another motion to compel further testimony by Beyer and to produce all of her notes and reports. Once again, the trial judge ordered unrestricted and unlimited inquiry into Officer Redmond's communications with Beyer. Nevertheless, both Redmond and Beyer remained unresponsive, providing little further information, with Officer Redmond saying "I don't recall" to the majority of the questions regarding the substance of the communications. Beyer ultimately produced three pages of redacted notes.

When plaintiffs renewed their complaint, the trial judge initially ordered that Redmond would be barred from testifying at trial about her version of the shooting incident "because [plaintiffs'] attorneys have been blocked from effective cross-examination." Prior to the trial, the judge reconsidered and vacated his ruling, but made it clear the jury would be instructed it could make an adverse inference from

[3] Similarly, the trial court ordered Officer Redmond to appear for another deposition and to answer questions concerning her statements to Beyer. Officer Redmond appeared, but gave evasive and incomplete answers to the questions she was asked.

the respondents' failure to produce Beyer's notes.[4]

The jury returned a verdict in favor of plaintiffs and awarded them $45,000 for the federal constitutional claim and $500,000 for the wrongful death claim. Respondents appealed on two grounds: (1) whether the district court erred in instructing the jury on the use of deadly force; and (2) whether the district court erred in refusing to recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between Officer Redmond and Beyer. The court of appeals found no error as to the first issue, but held that the district court had erred in failing to recognize a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence. Only the second issue is now before this Court.

SUMMARY OF ARGUMENT

Several factors support the recognition of a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence.[5] First, the language and history

[4] Over respondents' objection, the judge did, in fact, instruct the jury that it was "entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates." 51 F.3d at 1351.

[5] Dean Wigmore believes that, in general, four factors need to be satisfied before any privilege should be recognized: (1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. *See United States v. Friedman*, 636 F.Supp. 462, 463 (S.D.N.Y. 1986)(citations omitted). Although courts considering the privilege issue tend not to address these factors specifically, the factors, especially the fourth one, resonate throughout their decisions.

of Rule 501 leave little doubt that Congress intended the federal courts to have the authority to recognize a psychotherapist-patient privilege. Second, in the absence of clear precedent under federal law, federal courts have appropriately looked to state law for guidance. With remarkable uniformity, each of the fifty states has recognized some form of the psychotherapist-patient privilege. Third, legal and policy reasons compel recognition of the privilege under federal law. The communications at issue are at the core of any notion of personal privacy. And, as the common law has recognized with regard to other privileges for centuries, the prospect that intensely private communications may be subject to compulsory disclosure is likely to discourage at least some individuals from seeking the help they need for their mental disorders. That outcome benefits neither the individuals involved nor society at large.

Proposed Rule 504, for which Rule 501 was substituted, explicitly provided for a psychotherapist-patient privilege for confidential communications made for the purpose of treatment.[6] Although Rule 504 ultimately was not accepted by Congress, Rule 501 was enacted as a general rule of privilege providing federal courts with flexibility to recognize evidentiary privileges in light of "reason and experience." Fed.R.Evid. 501.

Here, as the court below found, both "reason and experience" strongly support recognition of a psychotherapist-privilege. In particular, the fact that every state in America has enacted legislation recognizing some version of the psychotherapist-patient privilege demonstrates a strong belief in the unique interests represented in the psychotherapist-

[6] *See* 56 F.R.D. 183, 240-41 (1972)(setting forth the privilege).

patient relationship and the need to protect those interests, the general effectiveness of mental health services, and the social benefits derived from individuals being able to avail themselves of mental health counseling without the fear of judicially compelled disclosure of their most private concerns by their therapists. Furthermore, the legitimate expectation of privacy in a democratic society includes the notion that an individual is entitled to an inner sanctum immune from governmental intrusion. This "zone of privacy" should encompass confidential psychotherapist-patient communications. *See generally* "Developments in the Law -- Privileged Communication," 98 Harv.L.Rev. 1450, 1544-47 (1985).

Finally, if this Court decides to recognize the privilege, it should extend it beyond psychiatrists and clinical psychologists to include any mental health care provider who functions as a psychiatrist or clinical psychologist might in a particular case and who meets certain licensing or educational requirements. Rather than a mental health care provider's specific title, the touchstone should be the function of the individual providing counseling services in the context of a particular relationship. Licensed clinical social workers, for example, provide counseling services to a growing number of people, including those who cannot afford (or whose managed care plan will not pay) the fees of a psychiatrist or psychologist. In recognition of this trend, numerous states have now extended the psychotherapist-patient privilege to other mental health care providers.

ARGUMENT

I. THIS COURT CAN AND SHOULD RECOGNIZE THE EXISTENCE OF A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER RULE 501 OF THE FEDERAL RULES OF EVIDENCE

A. The History And Language Of Rule 501 Plainly Contemplate Recognition Of A Psychotherapist-Patient Privilege

Rule 501 of the Federal Rules of Evidence was enacted as a general rule of privilege after Congress rejected a set of privilege rules which had been drafted by the Judiciary Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and the United States Supreme Court. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Proposed Rule 504 would have recognized the psychotherapist-patient privilege. 56 F.R.D. 183, 240-41 (1972). Rather than nine specific rules, Congress, preferring a more flexible approach, drafted one general rule of privilege. *United States v. Gillock*, 445 U.S. 360, 367 (1980). That Rule, 501, provides in relevant part:

> [T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Evid. 501.

Both on its face and as construed, this language grants federal courts the authority to continue the evolutionary development of testimonial privileges. As this Court has noted: "In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.'" *Trammel*, 445 U.S. at 47 (citations omitted).

The Historical Note to Rule 501 supports this expansive interpretation:

> The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable in civil and criminal cases.

Notes of Committee on the Judiciary, H.R. Rep.No. 650, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7082. In developing these privileges, the uniform standard federal courts are to employ is "reason and experience." Fed.R.Evid. 501.

Furthermore, Congress anticipated future litigation over the issue of a psychotherapist-patient privilege and issued a definitive explanation of its intent in enacting Rule 501:

> Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood

> as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep.No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7059.[7]

There can be little doubt, therefore, that Congress intended for privileges to be developed on a continuing basis and that it recognized the need for specific privileges based upon confidential relationships under appropriate circumstances. *See generally* Proposed Rule 504, Advisory Committee's Note, 56 F.R.D. 183, 242 ("While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field")(citations omitted).

[7] Despite this language, opponents of the privilege generally construe Congress' rejection of Rule 504 as an indication that it disapproved of a psychotherapist-patient privilege. *See, e.g., United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994)(not deciding the issue in general but holding privilege does not apply in narrow context of a child sex abuse case and interpreting Congress' rejection of specific privilege rules as preserving privilege law as it existed at common law); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989)(recognizing Congress intended courts to have flexibility to develop privilege rules on a case-by-case basis, but declaring its discretion under Rule 501 to be limited to the development of the privileges extant in the common law); *accord United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976)(no physician-patient privilege under the common law in federal criminal trials), and *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988)(no physician-patient or psychotherapist-patient privilege under the common law in federal criminal trials). This conclusion, however, cannot be reconciled with the legislative history cited above or this Court's approach in *Trammel*, 445 U.S. 40, as numerous other courts have recognized. *See, e.g., In Re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992)(citations omitted)("The cases rejecting the privilege are not helpful . . . because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege'"); *accord In Re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

B. The Fact That All Fifty States Recognize Some Form Of The Psychotherapist-Patient Privilege Provides Overwhelming Evidence That "Reason And Experience" Support Recognition Of The Privilege In Federal Law, As Well

Under Rule 501, the question of whether an evidentiary privilege applies in federal court is a matter of federal law in most circumstances, including the circumstances presented by this case.[8] But the fact that federal law governs does not mean that "the privilege law as developed in the states is irrelevant." *United States v. Gillock*, 445 U.S. at 365 n.8. To the contrary, state law is the most logical reference point when assessing whether "reason and experience" support recognition of a federal privilege. Thus, this Court "has taken note of state privilege law in determining whether to retain [particular privileges] in the federal system." *Id.*

Following this Court's lead, the court below looked in part to the law of privilege in Illinois, the situs of the events which gave rise to the underlying lawsuit, in holding that a psychotherapist-patient privilege exists under Rule 501. It observed that the Illinois Mental Health and Development Disabilities Confidentiality Act, 740 I.L.C.S. 110/1-110/17 (1994), expressly recognizes a psychotherapist-patient privilege.[9] 51 F.3d at 1357; *see also In re Zuniga*, 714 F.2d

[8] The final sentence of Rule 501 requires application of state privilege law "with respect to an element of a claim or defense as to which State law supplies the rule of decision . . . ."

[9] "Therapist" is broadly defined under the statute. It includes any "psy-
(continued...)

632, 638-39 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (recognizing the existence of a psychotherapist-patient privilege and noting that Michigan has one); *Sabree v. United Broth. of Carpenters & Joiners*, 126 F.R.D. 422 (D.Mass. 1989)(recognizing Massachusetts' psychotherapist-patient privilege).

The Seventh Circuit did not limit itself to Illinois law, however. In weighing the issues of "reason and experience" dictated by Rule 501, the court highlighted "the fact that all fifty states have recognized the need for and have adopted varying forms of the . . . privilege." 51 F.3d at 1356. Other courts have also found the prevalence of the privilege under state law to be persuasive. *See, e.g., In Re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992)("widespread adoption of the privilege strongly suggests that experience with it has been favorable"); *Zuniga*, 714 F.2d at 638 ("the states have demonstrated their willingness to recognize the privilege"); *see also U.S. v. D.F.*, 857 F.Supp. 1311 (E.D. Wis. 1994); *In re Grand Jury Subpoena*, 710 F.Supp. 999 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *United States v. Friedman*, 636 F. Supp. 463 (S.D.N.Y. 1986); *Ziemann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497 (D.N.J. 1994); *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474 (N.D.Ind. 1989); *In Re Grand Jury No. 91-1*, 795 F. Supp. 1057 (D.Colo. 1992); *Siegfried v. City of Easton*, 146 F.R.D. 98 (E.D.Pa. 1992); *Sabree*, 126 F.R.D. 422; *Calloway v. Marvel Entertainment Group*, 110 F.R.D. 45 (S.D.

[9] (...continued)
chiatrist, physician, psychologist, *social worker*, or nurse providing mental health or development disabilities services . . . ." *Jaffee*, 51 F.3d at 1357 (emphasis in original). The court stated: "Illinois law thus explicitly extends the privilege to communications with a licensed clinical social worker, like Karen Beyer." *Id.*

N.Y. 1986).[10]

C. Legal And Policy Reasons Support Recognition Of A Psychotherapist-Patient Privilege

1. Recognition Of A Psychotherapist-Patient Privilege Comports With Well-Established Notions Of A Right To Privacy

In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court analyzed its prior privacy cases and concluded that,

> the cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the independence in making certain kinds of important decisions.

Id. at 599-600 (footnotes omitted).

Both interests are implicated in the present case. The sorts of communications involved in the psychotherapist-patient relationship indisputably fit within the first prong of

[10] Failure to recognize a federal psychotherapist-patient privilege would do more than set the federal courts at odds with the rule in all fifty states. Under the ethical rules governing the profession, a therapist is obliged to tell her patient at the outset of the relationship about "the relevant limitations on confidentiality." *See* Standard 5.01 of The Ethical Principles of Psychologists and Code of Conduct. This information would inevitably undermine the policy decision of all fifty states to protect the confidentiality of the psychotherapist-patient relationship and thereby deter people in need from seeking the therapeutic assistance they require. Failure to recognize a federal psychotherapist-patient privilege would also promote the sort of federal-state forum shopping that this Court has long sought to discourage. *Cf. Erie v. Tompkins*, 304 U.S. 64 (1938).

this privacy definition. Indeed, the "disclosure of personal matters" is the essence of the therapeutic process. That process, moreover, is often directed toward assisting the patient in making important personal decisions.

This is not to suggest that the decision below can only be upheld if this Court finds that the psychotherapist-patient privilege is constitutionally compelled.[11] It is to suggest that the values protected by the privilege are deeply embedded in our constitutional jurisprudence. They are also reflected in a broad array of common law principles and statutory rights. *See* "Developments in the Law," *supra* p.7, at 1544-45 (providing examples of the vast body of common law and statutes protecting an individual's interest in privacy, ranging from the tort law of invasion of privacy and defamation to the Privacy Act of 1974[12] and the Family Educational Rights and Privacy Act of 1974[13]).

It is not surprising, therefore, that many courts, including the court below, have "focused on an individual's right of privacy . . . to justify the psychotherapist-patient privilege." *Jaffee*, 51 F.3d at 1356. *See also In Re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989)(acknowledging substantial constitutional right to privacy in psychotherapist-patient communications); *In Re August, 1993 Regular Grand Jury*, 854 F.Supp. 1380 (S.D.Ind. 1994)(assuming but not

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[11] Although that is an interesting question, it is not a question that needs to be decided in this case. *See, e.g., In Re Lifschutz*, 467 P.2d 557, 567 (Cal.Sup.Ct. 1970)(psychotherapist-patient privilege "had deeper roots than the [state] statute and draws sustenance from our constitutional heritage").

[12] 5 U.S.C. §552a (providing guidelines for the maintenance of records on individuals by the federal government).

[13] 20 U.S.C. §1232g (protecting the privacy of student educational records).

deciding that a constitutional right of privacy attaches to the psychotherapist-patient relationship).

The failure to endorse a psychotherapist-patient privilege would represent a serious intrusion into the "zone of privacy," *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), that this Court, Congress, and each of the states have repeatedly recognized in analogous contexts.

2. Recognition Of A Psychotherapist-Patient Privilege Will Promote The Social Goal Of Encouraging People In Need To Seek Therapeutic Assistance

In holding that a psychotherapist-patient privilege exists under the Federal Rules of Evidence, the court below reasoned that "[t]he recognition of a psychotherapist-patient privilege can only serve to encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." 51 F.3d at 1355. As the court explained: "Reason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.* at 1355-56.[14]

This concern was eloquently expressed by the Advisory Committee notes to proposed Rule 504:

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[14] The risk of deterrence may be difficult to quantify, but it is equally difficult to ignore. It is not unreasonable to assume, for example, that the victim of a sexual assault might think twice before seeking therapy if she knew that any statements she made during therapy could be used against her at trial. Similarly, individuals undergoing the stress of divorce might hesitate before seeking treatment if they knew that their intimate disclosures could be used in divorce litigation or could be sought by the adverse spouse for use as a club in settlement negotiations.

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Report No. 45, Group for the Advancement of Psychiatry 92 (1960), quoted in Proposed Rules, Advisory Committee Notes, 51 F.R.D. 315, 367 (1971); *accord* Slovenko, "Psychiatry and a Look at the Medical Privilege," 6 Wayne L. Rev. 175, 184 (1960)(containing extended exposition of why the privilege should exist and concluding that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied)(citations omitted).

In his treatise on evidence, Judge Weinstein has made the same point:

> Unlike the patient with physical ailments or complaints, who will likely consult a physician regardless of whether confidentiality is guaranteed, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom. Thus it has been recognized that a "psychiatrist" must have his patient's confidence or he cannot help him. Even though the suppression of relevant information may result in less accurate fact finding, "the social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence."

2 WEINSTEIN'S EVIDENCE 501-18 (1992), quoted in *In Re Grand Jury No. 91-1*, 795 F.Supp. at 1059.[15]

A recent study estimates that more than fifty-two million Americans suffer from a specific diagnosable mental disorder each year. *See* Darrel A. Regier, *et al.*, "The *De Facto* U.S. Mental and Addictive Disorders Service System: Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services," 50 Archives of General Psychiatry 85 (1993); *see also* Daniel Goleman, "Mental Disorders Common, But Few Get Treatment, Study Finds," N.Y. Times, March 17, 1993, at C13. This represents more than twenty eight percent of the adult population, or more than one in four.[16] Regier, *supra*, at 90. Of the fifty-two

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[15] This view is not universally shared. Those who are skeptical of a cause and effect relationship frequently cite Shuman and Weiner, "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege," 69 N.C.L.Rev. 893 (1982). In fact, Shuman and Weiner's study does not appreciably affect the balancing of interests since it concludes that both sides of the debate have "overstated their cases." *Id.* at 927. The study itself, therefore, is less significant than the fact that Professor Shuman, an acknowledged expert in the field, has assisted in the preparation of this brief and supports recognition of a psychotherapist-patient privilege because of its impact on the right to privacy.

[16] Even this number is conservative. It includes only mental disorders (continued...)

million Americans who suffer from mental illness each year, only eight percent get help. *Id.* Studies have also shown that mental disorders respond effectively to the broad range of treatment modalities currently available. *See* "The Effectiveness of Psychotherapy," *in* HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 3, 143 (A. Bergin & S. Garfield eds., 4th ed. 1994).[17]

Courts recognizing the privilege have taken note of the prevalence of mental illness in our society and the confidential relationship between a therapist and patient essential to effective treatment. The court in *Zuniga*, for example, made the following observation:

> . . . [A] psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say -- and all that the psychiatrist learns from what they say -- may be revealed to the whole world from a witness stand."

714 F.2d at 638 (quoting *Taylor v. United States*, 222 F.2d 398, 401 (D.C.Cir. 1995)(quoting Guttmacher and Weihofen, PSYCHIATRY AND THE LAW (1952). Absent a privilege, the court reasoned, a mentally ill individual may be unable to obtain the effective psychiatric treatment necessary to function in society. 714 F.2d at 639. Given these considerations, the court found that "reason and experience" warranted recognition of a psychotherapist-patient privilege. *Id.*

Similarly, the court in *Doe*, acknowledging the mandate of Rule 501 to look to "reason and experience," recognized the special relationship between a psychotherapist and patient. It observed that "it can hardly be disputed that communications between a patient and psychotherapist typically involve . . . intensely personal information." 964 F.2d at 1328. For that reason, among others, the Second Circuit concluded:

> Disclosure of communications to psychotherapists and their diagnoses would frequently be embarrassing to the point of mortification for the patient. Nor can it be seriously disputed that unrestrained disclosure might discourage persons form seeking psychiatric help. Reason thus supports recognition of the privilege.

Id. See also Clark v. Virginia Board of Examiners, 880 F.Supp. 430, 437-38 (E.D.Va. 1995).

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[16] (...continued)
within the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS. People with "problems in living," such as marital difficulties, were not included. Regier, *supra* p.17, at 88. This study found that close to nine million of those with mental disorders develop the problem for the first time each year, while another eight million suffer from a relapse of the condition developed earlier. *Id.*

[17] *See also* James W. Pennebaker, OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS (1990)(reporting extensive research about the benefits of talking about personal difficulties and the detriment in not talking about them; *e.g.*, the inhibition of thoughts and feelings imposes stress that, over time, gradually undermines the body's defenses, affecting immune function, the actions of the heart and vascular systems, and even the biochemical workings of the brain and nervous system).

Like Judge Weinstein and the courts in *Doe*, *Zuniga*, and *Jaffee*, *amici* believe that a psychotherapist and patient share a special and unique relationship requiring the protection of a testimonial privilege. The absence of such a privilege will be detrimental to many of the millions of individuals currently suffering from mental illnesses and will have a corresponding negative impact upon society at large. If the Court were to rule that no psychotherapist-patient privilege exists under the Federal Rules of Evidence, individuals contemplating psychotherapy will hesitate before seeking it. Those with especially personal problems may avoid seeking therapy altogether. *See generally Sabree v. United Broth. of Carpenters & Joiners*, 126 F.R.D. at 426 (court opined that, had patient known that his psychotherapist would be required to disclose his confidences about his private sexual problems, patient's trust in the psychotherapist would have been diminished and he may not have sought treatment at all). And those in therapy may avoid full disclosure with their therapists.[18]

Amici realize that the reluctance of some people with mental illness to seek a treatment is a complex phenomenon that reflects many factors, including embarrassment, the fear of public disclosure, and stigmatization.[19] But "reason and experience" surely do not support a federal rule of evidence that is contrary to the rule in all fifty states and, at the very least, runs the risk of discouraging those in need from seeking therapeutic assistance.[20]

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[18] The "fundamental" rule of psychotherapy, Freud wrote, is that the patient be totally forthcoming with the therapist. Sigmund Freud, "An Outline of Psychoanalysis," *in* 2 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 141 (1964). More broadly, self-censorship by the patient can significantly impair the therapeutic enterprise.

[19] The stigma attached to seeking mental health treatment has long been recognized. *See, e.g.*, "Report of the Task Panel on Public Attitudes and Use of Media for Promotion of Mental Health," *in* IV Task Panel Reports Submitted to the President's Commission on Mental Health 1864, 1870 (1978); Bruce J. Winick, "The Side Effects of Incompetency La-
(continued...)

[19] (...continued)
beling and the Implications for Mental Health Law," 1 Psychol. Pub. Pol'y & L. 6, 11 n.40 (1995).

[20] Recognition of the privilege may well involve recognition of some traditional exceptions to the privilege. In many states, for example, the privilege does not apply in child abuse proceedings, *see, e.g.*, N.Y. Family Court Act §1046(a)(vii)(1992), and confidentiality rules may be abrogated when disclosure is necessary to protect third parties from imminent danger, *e.g.*, *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal.Sup.Ct. 1976), 529 P.2d 553 (Cal.Sup.Ct. 1974). These traditional exceptions, however, are not implicated by this case, and are different than the balancing test applied by the court below. *Jaffee*, 51 F.3d at 1357 ("a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's session outweighs that patient's privacy interests"). Because the balancing test in this case supports recognition of the privilege, as the court below found, *id.* at 1357-58, this Court need not decide the propriety of the balancing test itself. Nonetheless, it is worth noting that the vagaries of a balancing test reintroduce the very uncertainties, and thus the risk of deterring people in need from seeking therapeutic assistance, that recognition of the privilege is designed to avoid.

II. ASSUMING THAT A PSYCHOTHERAPIST-PATIENT PRIVILEGE IS RECOGNIZED UNDER RULE 501, THE PRIVILEGE SHOULD EXTEND BEYOND PSYCHIATRISTS AND CLINICAL PSYCHOLOGISTS TO ENCOMPASS ANY MENTAL HEALTH CARE PROVIDER WHO FUNCTIONS AS A PSYCHIATRIST OR CLINICAL PSYCHOLOGIST MIGHT IN A PARTICULAR CASE AND WHO MEETS CERTAIN LICENSING OR EDUCATIONAL REQUIREMENTS

The purpose of recognizing a psychotherapist-patient privilege is to preserve the psychotherapist-patient relationship. That relationship, however, is no longer limited to psychiatrists and clinical psychologists, if it ever was.[21] As the court below observed:

> Professionals with quite a variety of job titles and descriptions provide mental health care to patients. Although we have consistently referred to the privilege we recognize in this case as *the psychotherapist/patient privilege, we note that this privilege extends to other mental health care providers as well, including licensed clinical social workers*. Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. Indeed, social workers have been characterized as the "'poor person's psychiatrist.'"

51 3d at 1358 n.19 (emphasis in original)(quoting "Developments in the Law," *supra* p.7, at 1550)(quoting Comment, "Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers," 61 Calif.L.Rev. 1050 (1973)).

Contrary to petitioner's allegations, neither respondents nor the court below nor *amici* advocate extending the privilege to "all mental health care providers." Petitioner's Brief at 37. It is appropriate to draw distinctions in order to preserve the delicate balance between society's interest in every person's testimony and its interest in preserving the privacy of confidential relationships. But that line should be drawn on the basis of function rather than title. *See* "Developments in the Law," *supra* p.7, at 1550.

Amici have no quarrel with a licensing requirement. But *amici* believe an emphasis on "function" is in full accord with the mandate of Rule 501 to make decisions regarding privileges "in light of reason and experience" and on a case-by-case basis.[22] A patient who is receiving therapy from a licensed clinical social worker has no different expectation of privacy, and should have no different right to confidentiality, than a person receiving therapy from a psychiatrist or clinical psychologist. "Developments in the Law," *supra* p.7, at 1551 ("The problems people bring to these professional counselors are often the same problems brought to psychotherapists; the need for trust and full disclosure is the same, and an identical privacy interest is in-

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[21] According to one recent study, there are approximately 30,642 psychiatrists, 56,000 psychologists, and 81,000 psychiatric social workers practicing mental health counseling today. Dial, *et al.*, "Human Resources in Mental Health," *in* MENTAL HEALTH, UNITED STATES 1990, at 196, 208 (R. Manderscheid & A. Sonnenschein eds., 1990).

[22] It is also consistent with the functional approach that this Court has taken to immunity questions, which looks to the "nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). *See also Buckley v. Fitzsimmons*, 509 U.S. __, 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478 (1991).

volved"). Moreover, the economics of the health care marketplace and the dictates of managed care have had an undeniable impact on who provides mental health care today.

Other important reasons support the extension of the privilege to a broader category of mental health professionals. The fact that only eight percent of those who suffer from mental illness seek help for their problems is one such reason. Regier, *supra* p.17, at 90. Assuming some correlation between the existence of a privilege and the likelihood of potential patients seeking mental health services, limiting the category of counselors covered will serve only to reduce this already miniscule number. Extension is especially warranted given the large number of licensed clinical social workers compared to the smaller number of psychiatrists and psychologists. *See* n.21, *supra*; "Developments in the Law," *supra* p.7, at 1550 ("Social workers offer the same services as psychotherapists, and are currently providing more direct mental health service than are psychologists and psychotherapists")(citations omitted).[23]

Reflecting this changing world, numerous states have enacted legislation granting the psychotherapist-patient privilege to licensed clinical social workers and other mental health providers. *Jaffee*, 51 F.3d at 1356 n.17.[24] The federal courts are beginning to follow suit. For example, in *Zeimann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497 (D.N.J. 1994), a qualified privilege was found to exist for licensed marriage counselors as an outgrowth of the psychotherapist-patient privilege. *Id. See generally Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474 (acknowledging that, under the right circumstances, privilege might extend to crisis intervention specialist with a master's degree in social work). A similar development has taken place in the physician-patient context, *see National Family Planning and Reproductive Health Assoc. v. Sullivan*, 1992 U.S.Dist. LEXIS 7043 (D.D.C.)(court found no rational basis to deny physician-patient privilege to nurse practitioners while providing it to physicians), *aff'd on other grounds*, 979 F.2d 227 (D.C.Cir. 1992).

In short, this Court should craft a definition of the psychotherapist-patient privilege that will be meaningful in fact as well as theory for the millions of Americans who, for a myriad of reasons, including financial need, seek thera-

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[23] Another factor supporting extension is the ever changing roles of those in the psychiatric professions: Although many psychiatrists practice psychotherapy, many others have become more engaged in prescribing and monitoring medication and have left psychotherapy to others. For the same reasons the privilege covers psychiatrists, these "others" should be covered by the privilege.

[24] *See, e.g.*, Cal.Evid. Code §1010 (West 1994)(licensed clinical social workers); C.R.S. §12-43-214 (Colo. 1995)(licensed marriage and family therapists, clinical social workers, professional counselors and, with (continued...)

[24] (...continued)
some exceptions, certified school psychologists); 24 Del.Code Ann. §3913 (1994)(licensed clinical social workers); Fla.Stat. ch. 90.503 (1994)(licensed clinical social workers); 225 I.L.C.S. 20/16 (Ill. 1995) (licensed clinical social workers and licensed social workers); N.Y.C.P. L.R. §4508 (1992)(licensed social workers); Iowa Code §622.10 (1991) (mental health professionals); O.R.S. §40.250 (Or. 1994)(licensed clinical social workers); U.R.E. Rule 506 (Utah 1994)(mental health therapists, including someone who is or is reasonably believed by a patient to be licensed or certified as a clinical or certified social worker, marriage or family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor); Va. Code Ann. §8.01-400.2 (1994)(licensed clinical social workers); W.Va. Code §30-13-12 (1995)(clinical social workers, certified social workers, graduate social workers and social workers); W.Va. Code §30-31-13 (1991)(licensed professional counselors).

peutic assistance from a licensed professional other than a psychiatrist or a clinical psychologist. Their rights to privacy and confidentiality are also entitled to recognition under the Federal Rules of Evidence.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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